The Design Defect Test in Washington: The Requisite Balance

I. INTRODUCTION

The early notions of strict liability for injuries caused by defectively designed products examined the relative "safeness" of the product. The original analysis required the fact-finder to determine that the product was "unreasonably dangerous" before strict liability could be imposed.[1] The jury typically was instructed to make the determination of whether a product was

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1. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965) (emphasis added):

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a *defective condition unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

See, e.g., Rossignol v. Danbury School of Aeronautics, Inc., 154 Conn. 549, 227 A.2d 418 (1967) (express adoption of § 402A "unreasonably dangerous" requirement); Suvada v. White Motor Co., 32 Ill. 2d 612, 210 N.E.2d 182 (1965) (adoption of strict liability rules that coincide with § 402A); Allen v. Coca-Cola Bottling Co., 403 S.W.2d 20 (Ky. 1966) (adopting the § 402A "unreasonably dangerous" test); Magnuson v. Rupp Mfg., Inc., 285 Minn. 32, 171 N.W.2d 201 (1969) (plaintiff must prove that the defect caused "unreasonable danger"); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967) ("test is whether the product is unreasonably dangerous or not reasonably safe"); Heaton v. Ford Motor Co., 248 Or. 467, 435 P.2d 806 (1967) (adopting the § 402A definition of "unreasonably dangerous"); Ford Motor Co. v. Lonon, 217 Tenn. 400, 398 S.W.2d 240 (1966) (adopting the § 402A "unreasonably dangerous" test); Darryl v. Ford Motor Co., 440 S.W.2d 630 (Tex. 1969) (liability depends on proof that push rod is "unreasonably dangerous"); Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967) (adopting § 402A "unreasonably dangerous" test).

Some jurisdictions have abandoned the "unreasonably dangerous" test of § 402A. *See, e.g.*, Butaud v. Suburban Marine & Sporting Goods, Inc., 543 P.2d 209 (Alaska 1975) (having the plaintiff prove not only the existence of a defect but also that the defect made the product "unreasonably dangerous" would place a heavier burden on the plaintiff); Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972) (plaintiff need only prove the existence of a defect, not that the product was "unreasonably dangerous"); Berkebile v. Brantly Helicopter Corp., 462 Pa. 83, 337 A.2d 893 (1975) (rejecting the "unreasonably dangerous" requirement).

unreasonably dangerous through the "consumer expectations" test.[2] If the jury concluded that a particular product was not as safe as would be reasonably expected by an ordinary consumer, then the product was unreasonably dangerous and strict liability was imposed.

When evaluating the broad concept of consumer expectations, the jury traditionally was asked to make an objective judgment after considering a variety of facts and circumstances. Considerable judicial and scholarly comment has questioned whether a jury is fundamentally competent to make the nebulous decision of what consumers generally expect in terms of a particular product's safety.[3] Some courts simply decided from the beginning that a risk-utility balancing test is a more efficient and accurate method of gauging product safety in design defect litigation than is the divination of consumer expectations.[4]

In recent years, courts have moved away from the traditional consumer expectations analysis. The modern view examines product safety through a risk-utility balancing process that

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2. *See* RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965):

> *Unreasonably dangerous.* The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. . . . The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.

See, e.g., Lunt v. Brady Mfg. Corp., 13 Ariz. App. 305, 475 P.2d 964 (1970) (quoting comment i "consumer expectations"); Rindlisbaker v. Wilson, 95 Idaho 752, 519 P.2d 421 (1974) (approving "consumer expectations" jury instructions paraphrased from comment i); Perfection Paint & Color Co. v. Konduris, 147 Ind. App. 106, 258 N.E.2d 681 (1970) (adopting § 402A comment i approach for "ordinary consumer expectations"); Bellotte v. Zayre Corp., 116 N.H. 52, 352 A.2d 723 (1976) (adopting comment i of § 402A); Skyhook Corp. v. Jasper, 90 N.M. 143, 560 P.2d 934 (1977) (comment i test for "unreasonably dangerous"); Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974) (adopting § 402A comment i "consumer expectations" test). *See also* Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability: From Quality to Process Standards*, 55 N.Y.U. L. REV. 347, 354 n.19 (1980) (authors explain four general methods used by courts to determine "unreasonably dangerous" designs in products) [hereinafter cited as Twerski, *Shifting Perspectives*].

3. *See generally* J. BEASLEY, PRODUCTS LIABILITY AND THE UNREASONABLY DANGEROUS REQUIREMENT (1981). *See infra* note 75.

4. *See, e.g.*, Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066, 1073 (4th Cir. 1974):

> In summary, every case such as this involves a delicate balancing of many factors in order to determine whether the manufacturer has used ordinary care in designing a car, which, giving consideration to market purposes and utility of the vehicle, did not involve unreasonable risk of injury to occupants within range of its "intended use."

inquires into the reasonableness of the product's design.[5] Washington courts have struggled with the transition from consumer expectations to risk-utility balancing. The courts in this state have never applied a pure consumer expectations test, but have in fact employed a combined consumer expectations/risk-utility examination.[6] That is, although juries in Washington have been instructed to determine whether a product has met the ordinary consumer's expectation of safety, they have been required to assess these expectations by weighing a number of risk-utility factors.[7]

A perplexing situation is presented when a judge or practitioner asks whether the plaintiff must present evidence regarding each of the factors in the risk-utility segment of Washington's design defect test. Washington courts have failed to articulate a standard by which a plaintiff can be certain that the burden of proof for the design defect test has been satisfied. The question becomes, in this trend towards risk-utility balancing, how much is enough? Can a jury adequately assess product safety if a design defect plaintiff offers evidence of only one or two of the factors in the risk-utility analysis?

This Comment examines Washington's application of the design defect consumer expectations test. Washington courts have been inconsistent during the recent transition in products liability law. A case in point is *Conner v. Skagit Corp.*,[8] in which the plaintiff was allowed to proceed with a design defect cause of action while offering proof of only one factor from the consumer expectations test. Accordingly, this Comment suggests that design defect plaintiffs must offer proof of multiple factors that relate to the issue of defectiveness and reasonableness. This proposal will be discussed in light of regional and national products liability theory and Washington's new statute, as well as the pol-

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5. *See* Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521, 521 (1982) ("The age of 'reasonableness' and risk-utility balancing is upon us.") [hereinafter cited as Twerski, *Seizing the Middle Ground*]; Twerski, *Shifting Perspectives*, *supra* note 2, at 355 ("The overwhelming consensus among courts deciding design defect cases is that a risk-utility analysis should be used as either an exclusive or an alternative ground of liability."). *See also infra* note 59.

6. Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 154, 592 P.2d 774, 779 (1975). In *Tabert*, strict liability was adopted for unreasonably dangerous products that cause injury. The design defect test set forth was "consumer expectations" with a risk-utility analysis. *Id. See infra* note 33.

7. *Id. See infra* text accompanying note 32.

8. 99 Wash. 2d 709, 664 P.2d 1208 (1983).

icies that justify strict liability in design defect litigation.

II. Design Defect Strict Liability in Washington

A. *The Evolution of the Design Defect Test in Washington*

In *Ulmer v. Ford Motor Co.*,[9] the Washington State Supreme Court adopted strict liability for a manufacturer who sells any product in a "defective condition unreasonably dangerous" that subsequently causes injury.[10] The Washington State Supreme Court reviewed prior cases in which the manufacturers of food products,[11] hair coloring,[12] and automobiles[13] were held liable without allegations and proof of negligence. In those cases, the court did not require the plaintiffs to show specific acts of negligence when proceeding on the theory of implied warranty.[14]

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9. 75 Wash. 2d 522, 452 P.2d 729 (1969). Ann Ulmer received injuries while riding in an automobile, manufactured by the defendant, that struck a concrete abutment. Ulmer alleged that the accident was caused by a defect in the automobile and that Ford should be held strictly liable. The trial court held for the defendant, and Ulmer assigned error to certain instructions that required the jury to analyze only simple negligence. The trial court gave instructions on the definition of negligence (instruction 5), on duty and breach (instruction 7), and on proximate cause (instruction 8). *Id.* at 524-25, 452 P.2d at 730. Ulmer contended that since her claim was premised upon strict liability, she was not required to prove any specific acts of negligence. *Id.* at 525, 452 P.2d at 731.

10. *Id.* at 530-32, 452 P.2d at 733-35.

11. *Id.* at 525, 452 P.2d at 731. *See* Pulley v. Pacific Coca-Cola Bottling Co., 68 Wash. 2d 778, 783, 415 P.2d 636, 640 (1966) (manufacturer of contaminated food product is liable to whoever is injured even though privity does not exist).

12. 75 Wash. 2d at 525, 452 P.2d at 731. *See* Esborg v. Bailey Drug Co., 61 Wash. 2d 347, 358, 378 P.2d 298, 304 (1963) (manufacturers of cosmetic products containing primary irritants or medically known chemical sensitizers impliedly warrant the merchantability and fitness for use of their products).

13. 75 Wash. 2d at 526, 452 P.2d at 731. *See* Brown v. General Motors Corp., 67 Wash. 2d 278, 280, 407 P.2d 461, 462 (1965); Baxter v. Ford Motor Co., 168 Wash. 456, 462, 12 P.2d 409, 412 (1932). Both courts held that the respective auto manufacturers could be held liable on a warranty theory for injuries caused by defects in the autos even though there was no proof of specific acts of negligence and no privity existed between the manufacturers and the plaintiffs.

14. 75 Wash. 2d at 527, 452 P.2d at 732 ("Since these cases were decided on the theory of warranty, in none of them was the plaintiff required to prove negligence on the part of the defendant.").

This view provided a conceptual basis to expand a plaintiff's theories for recovery to include strict liability while not requiring that the plaintiff prove individual acts of negligence. Just as in liability based upon an implied warranty, the theory of strict liability does not examine individual acts of negligence. Strict liability is focused on the quality and safeness of the product. *See* W. Prosser & W. Keeton, Prosser and Keeton on the Law of Torts §§ 97-98, at 690-94 (5th ed. 1984). *See also* Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963). *Greenman* was the first case to articulate the strict liability concept for products. *See infra* note 26. The *Greenman* court explained the relationship between warranty liability and strict

The court then recited section 402A of the Restatement (Second) of Torts,[15] which imposes strict liability on the manufacturer or seller of a product that causes injury to a user or consumer if the product is in a "defective condition unreasonably dangerous."[16] This early test imposed strict liability upon the defendant without proof of negligence, as long as the jury determined that the product was unreasonably dangerous. The focus was on the entire product, rather than on the defendant's negligence. Finally, the court stated:

> Section 402A, insofar as it pertains to manufacturers (and we are concerned in this case with a manufacturer only), is in accord with the import of our cases which have been decided upon a theory of breach of implied warranty and we hereby adopt it as the law of this jurisdiction.[17]

It was not until 1975, in *Seattle-First National Bank v. Tabert*,[18] that Washington recognized strict liability for a design defect. In *Tabert*, Seattle-First National Bank brought a design defect products liability action against a Volkswagen distributor.[19] Seattle-First claimed that "the lack of structural strength in the front panel"[20] was the proximate cause of the deaths of two people who were killed when their Volkswagen bus crashed into the rear of a truck. In accepting the design defect cause of action, the Washington State Supreme Court explained that unsafe designs present a very real danger to consumers.[21] The

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liability:

> Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, . . . and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products . . . make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.

Id. at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

15. 75 Wash. 2d at 531-32, 452 P.2d at 734. *See supra* note 1.

16. 75 Wash. 2d at 531-32, 452 P.2d at 734.

17. *Id.* For a brief yet detailed account of the development of strict liability, from its early warranty origins to the drafting of the Restatement, see Vandall, *"Design Defect" in Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61, 62-75 (1982).

18. 86 Wash. 2d 145, 542 P.2d 774 (1975).

19. *Id.* at 146, 542 P.2d at 774-75 ("Plaintiff sues as administrator of the estates of a husband and wife who were killed . . . .").

20. *Id.* at 146, 542 P.2d at 775.

21. *Id.* at 149-50, 542 P.2d at 776 ("A product may be just as dangerous and capable

court noted that design defect strict liability was a nationally accepted rationale for imposing liability and that Washington would be following the majority view[22] if the court adopted this theory in *Tabert*.

The court next confronted the task of formulating a test for determining the existence of a design defect. A formula was needed that would enable a jury to decide whether a particular product design was so unreasonably dangerous as to be defective. Only then would strict liability be imposed upon the manufacturer.[23]

Washington courts had generally followed section 402A of the Restatement (Second) of Torts for basic strict liability analysis.[24] The *Tabert* court recounted various judicial and academic interpretations of section 402A.[25] The court also evaluated competing design defect tests[26] and ultimately delineated a novel

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of producing injury whether its condition arises from a defect in design or from a defect in the manufacturing process.").

22. *Id.* at 149, 542 P.2d at 776 ("In holding that strict liability does encompass a design defect we join the prevailing, well-reasoned majority of cases.").

23. *Id.*

24. *See supra* note 1.

25. 86 Wash. 2d at 147-54, 542 P.2d at 775-79.

26. *Id.* at 151-54, 542 P.2d at 777-79. "It is apparent that we have a potpourri of theories and authorities from which to fashion our criteria, definitions, and limitations." *Id.* at 154, 542 P.2d at 779.

Design defect tests vary from jurisdiction to jurisdiction and within a single jurisdiction over time. Three significant California decisions in products liability law illustrate the potential for tinkering with design defect tests. Greenman v. Yuba Power Prods., Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), established the initial test for strict products liability. Greenman brought an action for injuries sustained while using a power tool manufactured by the defendant. The California Supreme Court stated that "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." *Id.* at 62, 377 P.2d at 900, 27 Cal. Rptr. at 700. Further, the court stated that a manufacturer is strictly liable when the plaintiff is injured due to "a defect in design and manufacture of which [the] plaintiff was not aware that made the [product] unsafe for its intended use." *Id.* at 64, 377 P.2d at 901, 27 Cal. Rptr. at 701.

The California Supreme Court refined the test for strict products liability in Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). In *Cronin*, the plaintiff was injured when a metal hasp broke in his delivery truck. The broken hasp allowed bread trays to slide forward and push the plaintiff through the windshield of the truck. The court rejected the notion that the plaintiff must follow the language of § 402A in meeting his burden of proof. "[T]o require an injured plaintiff to prove not only that the product contained a defect but also that such defect made the product unreasonably dangerous to the user or consumer would place a considerably greater burden upon him than that articulated in *Greenman*." *Id.* at 134-35, 501 P.2d at 1163, 104 Cal. Rptr. at 443. Thus, the *Cronin* court required proof of a defect, but not proof of an "unreasonably dangerous" character. At least one commentator has noted that the *Cronin* formula

test for determining the existence of a design defect.[27] The court adopted "consumer expectations" as the test for a design defect,[28] holding that under the rubric of section 402A an unreasonably dangerous design is equivalent to a defect.[29] A design defect would exist by definition if a product was "not reasonably safe," and evaluation of safeness would depend on the reasona-

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is a minority view and that most jurisdictions at that time accepted the "Restatement terminology." *See* W. PROSSER, J. WADE & V. SCHWARTZ, CASES AND MATERIALS ON TORTS 771 (7th ed. 1982).

In 1978 the California Supreme Court modified the *Cronin* test in Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978). In this design defect action, which was based on an injury caused by a "high lift loader," the court outlined a bifurcated test:

> [A] product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, *or* (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relevant factors discussed above, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.

Id. at 435, 573 P.2d at 457-58, 143 Cal. Rptr. at 239-40 (emphasis added). The *Barker* case, therefore, established a two-prong test requiring either consumer expectations or cost-benefit analysis, with the burden of proof on the defendant.

Oregon's design defect test illustrates that not all jurisdictions look to "consumer" or "user" tests. In Phillips v. Kimwood Mach. Co., 269 Or. 485, 525 P.2d 1033 (1974), the Supreme Court of Oregon set out a seller-oriented test: "A dangerously defective article would be one which a reasonable person would not put into the stream of commerce *if he had knowledge of its harmful character*. The test, therefore, is whether the seller would be negligent if he sold the article *knowing of the risk involved*." *Id.* at 492, 525 P.2d at 1036 (emphasis in original). The *Phillips* test looks to the manufacturer or seller and imputes constructive knowledge of the defect.

The Supreme Court of Oregon explained in Wilson v. Piper Aircraft Corp., 282 Or. 61, 577 P.2d 1322 (1978), that before the jury decides what the reasonably prudent manufacturer would have done had he known of the harmful characteristics of the product, the court must make an initial assessment as to whether the case should be submitted to the jury. "[T]he court should balance the utility of the risk against its magnitude in deciding whether to submit a design defect case to the jury." *Id.* at 67, 577 P.2d at 1326. Consequently, Oregon requires the judge to perform a risk-utility balance test prior to the jury's assessment of a design defect.

27. 86 Wash. 2d at 154, 542 P.2d at 779. The Washington test is novel because it is a combination of two approaches: consumer expectations and risk-utility balancing. *See infra* notes 33-34.

28. *Id.* at 154, 542 P.2d at 779.

29. *Id.* "If a product is unreasonably dangerous, it is necessarily defective. The plaintiff may, but should not be required to prove defectiveness as a separate matter." *Id.* The court chose to define a defect in terms of safeness. An unsafe product, according to the court, is a defective product. Thus, in Washington, a plaintiff does not have to prove a defective condition as well as an unreasonably dangerous character. *Id.* The plaintiff need only prove the product's unreasonably dangerous character, and this, by definition, establishes the existence of a defect. *See id.*

ble expectations of the ordinary consumer.[30]

Under *Tabert*, if a jury decided, based upon a number of factors, that a product did not meet the ordinary consumer's expectations of safety, then the product would automatically be defective and strict liability would follow.[31] The court set out a list of factors to be used by juries in ascertaining consumer expectations:

> In determining the reasonable expectations of the ordinary consumer, a number of factors *must* be considered. The relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant in a particular case. In other instances the nature of the product or the nature of the claimed defect may make other factors relevant to the issue.[32]

The factors set out by the *Tabert* court constitute a combined consumer expectations/risk-utility test.[33] While the final goal of the inquiry is to assess consumer expectations, the jury is required to perform, en route, a risk-utility balancing test. The court directed that juries in design defect cases *must* consider

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30. *Id.* ("This means that it must be unsafe to an extent beyond that which would be reasonably contemplated by the ordinary consumer."). This test is an interpretation of RESTATEMENT (SECOND) OF TORTS § 402A comment i (1965). *See supra* note 2. *See also* Lenhardt v. Ford Motor Co., 102 Wash. 2d 208, 212, 683 P.2d 1097, 1099 (1984) (citing Wiseman v. Goodyear Tire & Rubber Co., 29 Wash. App. 883, 631 P.2d 976 (1981)) ("The consumer has a reasonable expectation of buying a product which is reasonably safe; if there is something in the design which does not meet that expectation, the design is necessarily defective.").

31. This assumes the presence of injury and proximate cause. *See* Lenhardt v. Ford Motor Co., 102 Wash. 2d 208, 212, 683 P.2d 1097, 1099 (1984) ("As has been made clear in numerous cases, our jurisdiction utilizes a buyer-oriented approach, and the focus is on the buyer's expectation. Thus, our rule of strict liability focuses attention upon the product and not upon the actions of the seller or manufacturer.").

32. *Tabert*, 86 Wash. 2d at 154, 542 P.2d at 779 (emphasis added). The factors in *Tabert* should be compared to the factors articulated in *Barker* for the second prong of that California test: gravity of danger, likelihood of danger, feasibility of an alternative, cost of improvements, and adverse consequences to the product and consumer if the design were changed. Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 431, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978).

33. *See* Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 614 (1980) ("Thus to buttress the comment i approach, some courts have fashioned a consumer expectations test with a risk-utility base."); *id.* at 614 n.104 (citing *Tabert*). *See also* Twerski, *Shifting Perspectives*, *supra* note 2, at 354 n.19. Both Birnbaum and Twerski cite *Tabert* as a "combined standard" that employs consumer expectations as well as a retrospective negligence approach.

the factors presented in *Tabert*.[34]

B. Conner v. Skagit Corp.: *Departure from Balancing*

In *Conner v. Skagit Corp.*,[35] decided in 1983, the Washington State Supreme Court held that when a plaintiff limits allegations of unreasonable dangerousness to only one of the factors listed in *Tabert*, "he must establish that single factor beyond the balance of probabilities."[36] The *Conner* court thus impliedly held that a plaintiff could maintain a design defect strict liability cause of action with proof of only one of the factors set forth in *Tabert*. While the posture of the case is helpful for understanding this outcome, it does not justify a holding that cripples the risk-utility balancing approach articulated in *Tabert*.

Barry Conner was a logger employed by the Hammer Logging Company. In the fall of 1974, a piece of logging machinery amputated Conner's left arm. Conner brought a design defect products liability action against the manufacturers of the machinery, Skagit Corporation and Bendix Corporation. The jury held for the defendant,[37] and Conner appealed, challenging the court's instruction on his burden of proof.[38]

The instruction required the jury to find that Conner had proved three propositions for liability: first, that the product was dangerous beyond reasonable consumer expectations; second, that the design defect was the proximate cause of Conner's injury; and finally, that an alternative design existed that "more likely than not, would have prevented the accident."[39] Conner's

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34. *Tabert*, 86 Wash. 2d at 154, 542 P.2d at 779. Beasley describes the design defect test in Washington, under *Tabert*, as follows: "The reasonable expectations of the ordinary consumer are determined by engaging in a cost-benefit Wade balancing test . . . ." BEASLEY, *supra* note 3, at 230. *See also infra* note 57.

35. 99 Wash. 2d 709, 664 P.2d 1208 (1983).

36. *Id.* at 716-17, 664 P.2d at 1212-13.

37. Conner v. Skagit Corp., No. 82-4614, slip op. (Super. Ct. for King County, Wash. Apr. 25, 1979).

38. At the court of appeals, Conner challenged a number of the trial court's instructions. Conner v. Skagit Corp., 30 Wash. App. 725, 638 P.2d 115 (1981). In his petition for review to the Washington State Supreme Court, Conner challenged instruction 12, burden of proof, and instruction 14, assumption of risk. *Conner*, 99 Wash. 2d at 713, 664 P.2d at 1210. The controversial portion of the supreme court's opinion, and the crux of this Comment, concerns the treatment of the burden of proof issue.

39. The verbatim instructions are set out in Conner v. Skagit Corp., 30 Wash. App. 725, 727-28, 638 P.2d 115, 117-18 (1981):

> The first assignment of error is the giving of instruction 12:
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> The plaintiff has the burden of proof on each of the following allegations claiming defective design on the part of the defendants:

primary assignment of error concerned the relationship between the first and third points of this instruction. Conner argued that the first point, reasonable consumer expectations, was the sole test for design defect in Washington and that the third point, alternative design, was merely one factor that could be considered within the design defect consumer expectations test.[40]

The Washington State Supreme Court, while recognizing that the consumer expectations test consists of multiple factors, concluded that when a plaintiff brings allegations of only one factor within that test the plaintiff must then prove the existence of that factor "beyond the balance of the probabilities" in order to sustain the burden of proof.[41] The court stated as follows:

> In the present case, however, plaintiff chose not to rely on such other factors. Instead, he expressly limited his allegations to the existence of alternative designs . . . . If he seeks to meet [his] burden by establishing only one of the several factors contemplated by *Tabert*, it follows that he must establish that single factor beyond the balance of the probabilities. Plaintiff therefore had the burden of proving the availability of a safer design.[42]

Justice Dore, dissenting, asserted that the plaintiff carried his burden of proof under the traditional consumer expectations

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> First, that the yarder and tower manufactured by the defendants were designed in such a manner as to expose persons working near the equipment to hazards or dangers which were greater than would be reasonably contemplated or recognized by persons working in the logging industry in western Washington and possessing the ordinary knowledge of persons so employed as to the characteristics of said equipment.
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> Second, that the alleged defective design was a proximate cause of injuries sustained by the plaintiff on September 13, 1974.
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> Third, that there was available to the defendants a feasible and practical alternate design which, more likely than not, would have prevented the accident which resulted in plaintiff's injuries.
>
> If you find that the plaintiff has not sustained his burden of proof on any one or more of these propositions, your verdict must be for the defendants.

40. *Conner*, 99 Wash. 2d at 713, 664 P.2d at 1211. The *Conner* court stated as follows:

> Plaintiff argues that this instruction increased his burden of proof by elevating the availability of feasible alternative design to an element of the cause of action. He argues that alternative design is merely one of a number of factors which the jury may consider in determining whether a product is unreasonably dangerous.

Id.

41. 99 Wash. 2d at 716-17, 664 P.2d at 1212-13.

42. *Id.*

test for design defect, but was denied recovery because of the majority's erroneous expansion of that burden.[43] Justice Dore stated that the majority was wrong when it concluded that Conner limited his allegations to only one factor within the *Tabert* test.[44] The dissent pointed to numerous instances in the record where plaintiff's witnesses raised such issues as gravity of harm, cost of the product, and safety.[45]

Yet neither the majority nor the dissent asked one important question: Why was Conner allowed to maintain his case if he had only offered proof of one of the *Tabert* factors? This raises the doctrinal question whether a consumer expectations/risk-utility test for design defect can operate effectively if only one factor is presented to the jury. The *Conner* court seemed to assume that such a limitation of the *Tabert* design defect test was proper. If a design defect plaintiff relies on only one of the *Tabert* factors, however, should not that plaintiff be met with a motion for a directed verdict? The case law and policies of strict products liability suggest so.

C. *The Balancing Requirement of* Tabert *and Its Progeny*

1. *Washington Cases Since* Tabert

The *Tabert* court advanced explicit reasons for its determination that the jury in design defect cases must weigh a variety of factors. The court required that the jury consider "a number of factors"[46] because the court recognized that every product is different and, therefore, every product presents a unique risk.[47] A design defect test must be sufficiently flexible to allow for application in diverse situations.[48] The court emphasized that

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43. *Id.* at 723, 664 P.2d at 1216 (Dore, J., dissenting).

44. *Id.* at 719, 664 P.2d at 1214 (Dore, J., dissenting) ("The majority assumes the plaintiff chose not to rely on any of the other factors listed in *Tabert*. The record simply does not support this conclusion.").

45. *Id.* at 721-23, 664 P.2d at 1215-16 (Dore, J., dissenting).

46. 86 Wash. 2d at 154, 542 P.2d at 779. *See* Note, *Relevance of Industry Custom in Strict Product Liability*, 60 WASH. L. REV. 195 (1984).

47. *Id.* The court illustrated that expectations and hazards can differ from product to product. The court explained that consumers would not expect the same degree of safety in a Volkswagen as they would in an expensive Cadillac. The court, before requiring that multiple factors be considered, stated that "[t]his evaluation of the product in terms of the reasonable expectations of the ordinary consumer allows the trier of fact to take into account the intrinsic nature of the product." *Id.*

48. Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803, 838-39 (1976) (discussing the

"[i]t must be borne in mind that we are dealing with a relative, not an absolute concept."[49] Moreover, the court recognized that, in some situations, reliance on the articulated factors still may not provide the jury with an adequate basis from which to determine consumer expectations.[50] To construe the *Tabert* standard as allowing the plaintiff the option to rely on a proof consisting of a single factor would defeat the goals of the multi-factor approach. A test that considers multiple factors is more durable, accurate, and flexible than a test that assesses consumer expectations after analyzing only a single factor.

Conner interrupted a string of post-*Tabert* cases that had followed the *Tabert* rule.[51] *Tabert*'s progeny generally quoted the multi-factor requirement directly or noted that the plaintiff actually offered proof of a number of relevant factors.[52]

Just two months before *Conner*, the Washington Court of Appeals discussed the *Tabert* test for consumer expectations in *Giordano v. McNeilab, Inc.*[53] In *Giordano*, the court explained

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"need for flexibility" and explaining that the policies of strict liability are not promoted by "facile tests for determining liability").

49. 86 Wash. 2d at 154, 542 P.2d at 779.

50. *Id.* ("[in] other instances the nature of the product or the nature of the claimed defect may make other factors relevant to the issue").

51. *E.g.*, Little v. PPG Indus., 92 Wash. 2d 118, 122-23, 594 P.2d 911, 914 (1979) (quoting the multi-factor test directly from *Tabert*); Lamon v. McDonnell Douglas Corp., 91 Wash. 2d 345, 351, 588 P.2d 1346, 1349-50 (1979) (court reworded the standard, affirming that multiple factors are required and stated that "a trier of fact must consider, along with the intrinsic nature of the product, a number of factors"); Ryder v. Kelly-Springfield Tire Co., 91 Wash. 2d 111, 118, 587 P.2d 160, 164 (1978) (court relied on *Tabert* in stating that "[i]n determining the reasonable expectations of the ordinary consumer, a number of factors must be considered"); Wagner v. Flightcraft, Inc., 31 Wash. App. 558, 565, 643 P.2d 906, 910-11 (1982) ("Through such testimony, the jury considered the relevant factors about the . . . design such as the product's utility, safety aspects, available alternatives, feasibility of eliminating unsafe characteristics, feasibility of spreading potential losses, the user's ability to avoid danger, and the user's anticipated awareness of the product's inherent dangers."); Bich v. General Elec. Co., 27 Wash. App. 25, 32, 614 P.2d 1323, 1328 (1980) (court cited the *Tabert* standard); Novak v. Piggly Wiggly Puget Sound Co., 22 Wash. App. 407, 410, 591 P.2d 791, 794 (1979) ("This definition has been adopted by our Supreme Court, which has stated that the reasonable expectations of the ordinary consumer are determined by considering such factors as . . . .").

52. *See supra* note 51. Research has not located any Washington case, other than *Conner*, in which the plaintiff attempted to prevail in a design defect cause of action while relying on proof of only one of the *Tabert* factors.

53. 35 Wash. App. 221, 224, 666 P.2d 384, 385-86 (1983). In *Giordano*, the defendant moved for summary judgment, but the court found a genuine issue of material fact: whether the product was unreasonably dangerous. *Id.* at 223, 666 P.2d at 385. The court then set out the test for consumer expectations, emphasizing the requirement of multiple factors. The product in *Giordano* was a glass ampule used to store and preserve medica-

that the consumer expectations test must take into consideration the "intrinsic nature of the product,"[54] and emphasized that an evaluation of a number of factors, as stated in *Tabert*, was the required test.[55] The court noted that the post-*Tabert* decisions required consideration of a "number of factors."[56]

2. *Judicial and Academic Commentary*

The vast majority of commentators have recommended the multi-factor approach.[57] Professor Wade has advanced the

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tion prior to injection.

54. *Giordano*, 35 Wash. App. at 224, 666 P.2d at 385 (quoting *Tabert*, 86 Wash. 2d at 154, 542 P.2d at 779). *See supra* note 47 and accompanying text.

55. 35 Wash. App. at 224, 666 P.2d at 385-86.

56. *Id.* (quoting Lamon v. McDonnell Douglas Corp., 91 Wash. 2d 345, 351, 588 P.2d 1346, 1349-50 (1979); Wagner v. Flightcraft, Inc., 31 Wash. App. 558, 565, 643 P.2d 906, 910-11 (1982); Bernal v. American Honda Motor Co., 87 Wash. 2d 406, 411, 553 P.2d 107, 110 (1976)).

57. See Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825 (1973), in which Professor Wade articulated the following factors for design defect analysis:

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
>
> (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
>
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
>
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
>
> (6) The user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.
>
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id. at 837-38. The Wade factors have been commonly cited as the definitive standard or as authority for creative modification by the courts and commentators.

See also Fisher, *Products Liability—The Meaning of Defect*, 39 MO. L. REV. 339 (1974). Fisher concurs that a number of factors should be considered and lists the relevant facts that he would analyze:

> In deciding when to impose strict liability courts should consider, in light of the facts of the particular case, the merits of the policies underlying strict liability and balance these considerations against countervailing factors. Some of the factors that should be considered are as follows:
>
> I. Risk Spreading
>
> A. From the point of view of consumer.
>
> 1. Ability of consumer to bear loss.
>
> 2. Feasibility and effectiveness of self-protective measures.
>
> a. Knowledge of risk.

notion that a balancing test is the proper tool for establishing some measure of "fairness" in the tension between the interests of the consumer and the interests of the manufacturer.[58] In addition, balancing is the method adopted by a majority of jurisdictions for determining the safeness of a product.[59] By its very

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b. Ability to control danger.
c. Feasibility of deciding against use of product.

B. From point of view of manufacturer.
1. Knowledge of risk.
2. Accuracy of prediction of losses.
3. Size of losses.
4. Availability of insurance.
5. Ability of manufacturer to self-insure.
6. Effect of increased prices on industry.
7. Public necessity for the product.
8. Deterrent effect on the development of new products.

II. Safety Incentive
A. Likelihood of future product improvement.
B. Existence of additional precautions that can presently be taken.
C. Availability of safer substitutes.

Id. at 359. *See also* Montgomery & Owen, *supra* note 48, at 818 (proposing four factors to guide the determination of strict liability in cases involving the manufacture and sale of injury-producing products).

For a discussion of cases and jurisdictions that have expressly adopted the Wade balancing test see BEASLEY, *supra* note 3, at 211-71. *See also* Roach v. Kononen, 269 Or. 457, 525 P.2d 125 (1974) (applying the 7 Wade factors); Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 386 A.2d 816 (1978) (adopting the Wade balancing test); Turner v. General Motors Corp., 514 S.W.2d 497 (Tex. Civ. App. 1974) (setting forth the balancing test approach).

58. Wade, *On Product "Design Defects" and Their Actionability*, 33 VAND. L. REV. 551 (1980). Wade asks: "Further, what should be the test, if one seeks objectively to find a fair balance between the conflicting interests of the manufacturer (or other supplier) and the consumer (or other injured party)?" *Id.* at 566. "Clearly, safety must be a relative matter, and a balancing process of some sort is necessary to determine whether a product is sufficiently safe—regardless of whether the suit is in negligence or in strict liability." *Id.* at 568. "[A] coherent analysis in design defect cases requires a balancing process." *Id.* at 570.

See also R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW (1983). The author notes the proper interpretation regarding the use of Wade's factors: "Thus, in perhaps the most influential account of product defect in design cases, that of Professor Wade, we are told to take into account *all* of the following factors . . . ." *Id.* at 77-78 (emphasis added).

59. See Twerski, *From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation*, 11 HOFSTRA L. REV. 861 (1983), in which Professor Twerski states that "[t]here is a broad-based consensus among courts that in most cases risk-utility analysis must be utilized to establish the standard of product quality." *Id.* at 895. *See, e.g.*, Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (balancing test is one alternative test for determining design defects); Weber v. Fidelity & Casualty Ins. Co., 259 La. 599, 250 So. 2d 754 (1971) (balancing test combined with comment i approach); State Stove Mfg. Co. v. Hodges, 189 So. 2d 113 (Miss. 1966) (balancing test for design defects), *cert. denied*, 386 U.S. 912 (1967). *See also supra* note 57 and cases cited therein.

nature, the balancing inquiry seeks to locate a fair level of expected product safety.[60]

A risk-utility balancing test simply cannot perform its intended function when, as in *Conner*, only one of the many factors is argued by the plaintiff. How can a balancing occur when only one factor is placed on the scale? What is even more surprising in *Conner* is that the factor relied upon by the plaintiff is the one that has received widespread criticism as insufficient standing alone.[61] An allegation of design defect that consists solely of the possibility of a feasible alternative, without discussing risk, harm, or cost, presents a vague and polycentric[62] question.[63] One commentator has noted that "[w]hat constitutes a feasible alternative is conceptually unclear . . . and courts in their confusion have allowed spurious claims to reach the jury."[64] Professor Epstein has suggested that an allegation of an alternative design should not, by itself, raise a jury question as to the existence of a design defect.[65] Professor Twerski has raised this same point in the context of the National Products

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Commentators agree. *See* Henderson, *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of An Emerging Consensus*, 63 MINN. L. REV. 773, 779 (1979) ("In the judgment of most post-*Cronin* commentators, the only intelligent approach to the issue of defective product design involves cost-benefit analysis."). *See also* Henderson's list of cases and articles that support the cost-benefit approach. *Id.* at 775 n.10.

60. *Id.* at 892. Twerski explains that "[t]he essence of risk-utility analysis is the balancing and weighing of various considerations so that a composite judgment can be made as to whether the product as designed embodied 'excessive preventable danger.' " *Id.*

61. *See infra* notes 65-66 and accompanying text.

62. See Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1534-42 (1973), in which Professor Henderson devotes a substantial portion of his article to an analysis of polycentricity in product liability litigation. Henderson states that "polycentric problems are many-centered problems, in which each point for decision is related to all the others as are the strands of a spider web. If one strand is pulled, the relationships among all the strands will again be readjusted." *Id.* at 1536. Thus, a lawyer who attempts to rely on one strand for the basis of an argument "would find his arguments regarding the earlier points shifting beneath him." *Id.*

63. *See* Twerski, *Seizing the Middle Ground*, *supra* note 5, at 551-53.

64. Henderson, *Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform*, 56 N.C.L. REV. 625, 636 (1978).

65. R. EPSTEIN, *supra* note 58, at 80. Professor Epstein agrees that design defect cases cannot proceed with evidence of only one factor. Significantly, the factor that Epstein cites as insufficient standing alone is alternative design, the same factor held to be sufficient in *Conner*. Epstein discusses Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976), and states that the court showed a "commendable display of good sense" in determining that a "court need not treat the possibility of alternative design as raising a triable issue on the defect question." R. EPSTEIN, *supra* note 58, at 80.

Liability Act, explaining that "a design alternative shall not be adequate to establish a case for design defect" unless such other factors, like utility, cost, and added safety benefits, are taken into consideration as well.[66]

In sum, each proposed design defect test contemplates the balancing of a number of factors.[67] A common ingredient is the consideration of the probability of harm and utility of the design.[68] The *Conner* approach has strayed from the decisions in Washington, the comprehensive treatment by commentators, and the decisions in other jurisdictions. Washington courts should now move to promote a higher-quality proof by plaintiffs in design defect litigation.

III. Promoting Quality Proof in Design Defect Litigation: Directed Verdicts When Plaintiffs Fail to Meet the *Tabert* Standard

A. Directed Verdicts

Courts traditionally direct a verdict in favor of the defendant when the plaintiff has not met the required burden of proof[69] and when reasonable minds could not differ that the defendant is entitled to judgment.[70] In a products liability context, it has been said that when the "evidence clearly compels the conclusion that the utility of safety improvements is plainly outweighed by their disutility," the case should be dismissed or a directed verdict should be entered for the manufacturer.[71] Similarly, one commentator has suggested that a court must weigh at least ten factors to determine whether the plaintiff has

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66. Twerski, *Seizing the Middle Ground*, *supra* note 5, at 555.

67. *See* Keeton, *Product Liability—Design Hazards and the Meaning of Defect*, 10 Cum. L. Rev. 293, 313-14 (1979) (proposing a risk-utility balancing test that analyzes a number of interests, particularly the magnitude of danger and the utility of the design); Twerski, *supra* note 59, at 895-96 (emphasizing the likelihood of injury). *See also supra* notes 57 & 59.

68. *See supra* note 67.

69. *See, e.g.*, Amsbury v. Cowles Publishing Co., 76 Wash. 2d 733, 735, 458 P.2d 882, 883 (1969) (directed verdict is proper procedural tool to remove an issue from the jury's consideration); Hemmen v. Clark's Restaurant Enters., 72 Wash. 2d 690, 691, 434 P.2d 729, 731 (1967) (motion that challenges the sufficiency of the evidence, for a directed verdict, admits the truth of the opponent's evidence); Osborn v. Lake Wash. School Dist. No. 414, 1 Wash. App. 534, 535, 462 P.2d 966, 968 (1969) (trial court must interpret evidence most favorably to nonmoving party). *See* C. Wright, Federal Courts § 95 (4th ed. 1983); Wash. Super. Ct. Civ. R. 50.

70. *See supra* note 69.

71. Montgomery & Owen, *supra* note 48, at 833.

presented "sufficient evidence of defect to give [the case] to the jury."[72] The general view is that if a design defect claim goes to the jury on "thin liability facts," victims will be given awards based on jury sympathy rather than on evidence.[73]

Some design defect cases may present issues of such extreme complexity, calling for levels of competence not possessed by juries, that a directed verdict would be an appropriate response.[74] The problem is simpler, however, when the plaintiff has offered insufficient proof. A design defect plaintiff should suffer a directed verdict if the plaintiff's proofs do not offer sufficient evidence to allow the jury to balance and weigh adequately the required factors articulated in the risk-utility test.

The balancing approach in the risk-utility test was developed because of the fundamental inefficiencies of a pure consumer expectations standard. That is, who could ever assess what consumers expect, in terms of product safety, without a balancing of risk and utility?[75] Accordingly, if a jury does not

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72. Vandall, *"Design Defect" in Products Liability: Rethinking Negligence and Strict Liability*, 43 OHIO ST. L.J. 61, 83-84 (1982) (recommending 10 factors for the court to consider, each very similar to those utilized by the jury in determining the existence of a defect).

73. Schwartz, *Foreword: Understanding Products Liability*, 67 CALIF. L. REV. 435, 470 (1979). *See* Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796, 850 ("directed verdict device . . . dissuades plaintiffs with marginal claims from suing").

74. *See generally* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973); Twerski, *supra* note 59, at 862-69; Twerski, *Seizing the Middle Ground*, *supra* note 5, at 552-53.

75. Professor Keeton has criticized the theory of a consumer expectations test for design defect. Keeton, *supra* note 67, at 302-03. Keeton cites three main reasons for the inaccuracy of consumer expectations as a test for design defect: "First, a victim could never recover for harm suffered as a result of a design hazard that was open and obvious or one with respect to which the purchaser was adequately informed." *Id.* at 302. "Secondly, this test can result in the identification of products as being dangerously defective when clearly they are not so." *Id.* at 303. "Thirdly, underlying the test is the fallacious assumption that the ordinary purchaser has definite expectations regarding the dangerousness of the products purchased. This is not so." *Id. See* Birnbaum, *supra* note 33, at 614-16. Professor Birnbaum criticizes the design defect test that relies on consumer expectations:

> That is, in seeking to establish that a product is dangerous to an extent beyond that which the ordinary consumer would expect, the trier of fact must first determine what reasonable consumer expectations would be. Under a literal application of comment i, the trier of fact would be invited to rely on some vague commonsense notion of what the ordinary consumer expects in the way of safety. The court would offer no guidelines to help the trier of fact in making this crucial determination. Nonetheless, by grounding the comment i test on a risk-utility base, some courts have recognized the need to define for the jury exactly which factors should be considered in discerning what the objec-

receive a "quality proof," one that enables the jury to perform the risk-utility weighing test, then the test is crippled, and the jury cannot achieve an accurate estimate of product safety or consumer expectations.

Recent state supreme court decisions in New Jersey and Oregon have set forth rules designed to ensure that a design defect plaintiff presents a "quality proof." These decisions confirm that a plaintiff should not be allowed to reach the jury with a design defect claim unless evidence of a number of relevant factors has been presented. In *O'Brien v. Muskin Corp.*,[76] the New Jersey Supreme Court stated that "[i]n a design-defect case, the plaintiff bears the burden of both going forward with the evidence and of persuasion that the product contained a defect. To establish a *prima facie* case, the *plaintiff should adduce sufficient evidence on the risk-utility factors to establish a defect.*"[77]

Similarly, in *Wilson v. Piper Aircraft Corp.*,[78] the Oregon Supreme Court reaffirmed its position that a trial court should not allow design defect claims based upon insufficient evidence to reach the jury. The court explained that a trial court should perform its own balancing test, stating that "the court should balance the utility of the risk and its magnitude in deciding

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tive ordinary consumer expects . . . .

> Burdening a product defect analysis with the conceptual baggage of the hypothetical ordinary consumer adds essentially nothing of substance to a straightforward risk-utility balancing approach . . . . In other words, to determine if a product is unsafe beyond the ordinary consumer's contemplation, the trier of fact must first decide what this hypothetical ordinary consumer would reasonably contemplate. To do this, the trier of fact must balance the various risk-utility factors involved. The conclusions drawn from this weighing of factors is then said to constitute the reasonable expectations of the ordinary consumer . . . . With a single-standard test, however, there is the danger that these considerations will improperly infect the balancing test with notions of implied assumption of risk where a patent design defect is at issue.

Id.

See also Keeton, *supra* note 67, at 302-04 (consumer expectations test inconclusive as to whether person in fact weighed utility against danger); Rheingold, *What Are the Consumer's "Reasonable Expectations"?*, 22 BUS. LAW. 589, 593 (1967) (test based on consumer expectations is imprecise and will require case-by-case analysis); Schwartz, *supra* note 73, at 475-81 (consumer expectation standard is unable to stand on its own in difficult cases); Twerski, *supra* note 59, at 895-908 (courts must be careful to screen out weak claims based on consumer expectations).

76. 94 N.J. 169, 463 A.2d 298 (1983).

77. *Id.* at 185, 463 A.2d at 306 (emphasis added).

78. 282 Or. 61, 577 P.2d 1322 (1977), *reh'g denied*, 282 Or. 411, 579 P.2d 1287 (1978).

whether to submit a design defect case to the jury . . . . The trial court should not permit an allegation of design defect unless there is sufficient evidence upon which to make this determination."[79] The Oregon Supreme Court emphasized that, in many instances, a claim of a safer alternative design should not go to the jury unless there is sufficient evidence of other relevant factors such as cost, feasibility, practicability, and general utility.[80] The court stated that "[i]t is part of the required proof that a design feature is a 'defect' to present such evidence."[81]

B. Statutory Reform

In 1981 the Washington State Legislature reformed the state's products liability law.[82] A significant debate has commenced regarding the extent to which the *Tabert* factors should be balanced under the new test for design defect.[83] The statute

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79. *Id.* at 67-68, 577 P.2d at 1326.

80. *Id.* at 69, 577 P.2d at 1327.

81. *Id.*

82. WASH. REV. CODE ch. 7.72 (1983). For a discussion of the products liability statutes in Washington State, see Talmadge, *Tort and Product Liability Reform*, 5 U. PUGET SOUND L. REV. 1 (1981); Comment, *Products Liability—Tort Reform: An Overview of Washington's New Act*, 17 GONZ. L. REV. 357 (1981); Comment, *Product Liability Reform Proposals in Washington—A Public Policy Analysis*, 4 U. PUGET SOUND L. REV. 143 (1980).

83. *Compare* the majority opinion in Lenhardt v. Ford Motor Co., 102 Wash. 2d 208, 214-15, 683 P.2d 1097, 1098 (1984) *with* Justice Dimmick's dissenting opinion in that same case, 102 Wash. 2d at 215-19, 683 P.2d at 1101-03 (Dimmick, J., dissenting). Justice Brachtenbach, speaking for the majority, stated that:

> One of the more significant changes adopted by the Legislature was to change the standard of liability for design . . . defects. The Legislature felt that the balancing factors announced in *Tabert* . . . had implicitly created a negligence standard for strict liability causes of action. Therefore, the Legislature adopted negligence standards as the standard of liability for design . . . defects under the new act.

102 Wash. 2d at 214, 683 P.2d at 1101.

Justice Dimmick, dissenting, strongly disagreed and explained why the new act still requires the *Tabert* balancing test:

> In defining "unreasonably unsafe" in product design cases, the Legislature purported to make explicit the balancing test that was implicitly followed under strict liability law. Final Report, at 17-18. The Washington State Senate's Select Committee on Tort and Product Liability Reform expressed the view that, in balancing various factors, the trier of fact should take into account the greatest amount of evidence available. Final Report, at 39-40. This policy judgment makes good sense whether considering product liability under case law or the new act. I see no reason to strain the rationale of our prior cases, and now disavow the balancing test of *Tabert*, to reach a result contrary to the product liability act.
>
> The new product liability act retained the consumer expectations test as a

provides the following test for design defect:

> (1) A product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.
>
> (a) A product is not reasonably safe as designed, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product.
>
> . . . .
>
> (3) In determining whether a product was not reasonably safe under this section, the trier of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.[84]

The new statute should be interpreted to include the *Tabert* test. Subsection (3) is the same consumer expectations test articulated by the court in *Tabert*.[85] Moreover, both the legislative history[86] and the official Senate Committee Report[87] specify

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factor in determining liability for design defect because it was believed to be harmonious with the act's balancing test used for determining reasonable safety. Final Report, at 35-36. Our decisions support that legislative judgment. Under *Tabert*, determining the reasonable expectations of the ordinary consumer requires balancing various factors such as the product's cost, the gravity of harm, and the cost and feasibility of eliminating or minimizing the risk to the consumer. . . . Because the function of this balancing is to evaluate the reasonableness of the degree of safety the product possesses to the ordinary user, the test is comparable to a negligence analysis. . . .

This balancing of risk and utility in a strict liability case does not transform strict liability into negligence.

102 Wash. 2d at 216-17, 683 P.2d at 1102 (Dimmick, J., dissenting).

84. WASH. REV. CODE §§ 7.72.030(1)(a), (3) (1983).

85. *See supra* note 30 and accompanying text.

86. *See* SENATE JOURNAL, 47TH LEGISLATURE 631 (1981). After discussing criticism of the *Tabert* test, the report explains that the

> UPLA adopts a test which balances the likelihood and seriousness of the harm against the burden to produce a safer product and the effect of such a design on the usefulness of the product. Factors examined under such a balancing test are similar to those suggested by the Washington Court in analyzing the consumer expectation test, *Seattle-First National Bank v. Tabert*, 86 Wash. 2d 145 (1975), and therefore can be harmonized with the consumer expectation test. *Thus, both tests are adopted here as relevant considerations which the trier of fact should consider.*

expressly that the *Tabert* consumer expectations test is to be included in the statute.[88] The statute clearly provides for a risk-utility balancing under both section (1)(a) and section (3).[89]

While the statute does not address the question of directed verdicts when a plaintiff fails to establish a proof that raises the multiple factors, it does urge that plaintiffs present to the jury as much evidence as is available.[90] The statute states that industry custom, technological feasibility, and private or public regulatory standards are all relevant to the jury's consideration.[91] The legislative history stresses that this section encourages "the greatest amount of evidence available" in order for the jury to demonstrate its "inherent ability . . . to reach a just conclusion."[92] Thus, the premise of the legislature is the same as that developed under the case law and in the commentaries: a jury needs to balance a variety of factors, not just one, in order to reach an accurate decision regarding the existence of a design defect.

IV. Conclusion

A design defect test that requires comprehensive information regarding a broad range of relevant factors is a test that will assist the trier of fact in accurately assessing the existence of a design defect. When a jury is asked to make the nebulous determination whether a product is unreasonably dangerous, the jury should have more than one factor to balance and weigh. Until *Conner*, Washington law required consideration of "a number of factors."[93] The history and policies of design defect/strict liability litigation suggest that it would be best to move away from *Conner* and toward directed verdicts in favor of defendants when plaintiffs fail to provide a quality proof under the *Tabert* test.

Joshua J. Preece

Id. (emphasis added).

87. *See* Washington State Senate Select Committee on Tort & Product Liability Reform, Final Report 36 (1981).

88. Justice Dimmick raised this point in her dissenting opinion. Lenhardt v. Ford Motor Co., 102 Wash. 2d 208, 215, 683 P.2d 1097, 1101 (1984) (Dimmick, J., dissenting).

89. *See supra* note 84.

90. Wash. Rev. Code § 7.72.050 (1983).

91. *Id.*

92. Senate Journal, 47th Legislature 632 (1981).

93. 86 Wash. 2d at 154, 542 P.2d at 779.